SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

MEGHAN MURPHY,

Plaintiff,

v.

TWITTER, INC., a California corporation; TWITTER INTERNATIONAL COMPANY, an Irish registered company,

Defendants.

Case No. CGC-19-573712

ORDER DENYING SPECIAL MOTION TO STRIKE THE COMPLAINT UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16 AND SUSTAINING DEMURRER TO COMPLAINT WITHOUT LEAVE TO AMEND

On May 7, 2019, the Court heard Defendants Twitter, Inc. and Twitter International Company's (together, "Twitter") special motion to strike the complaint under California Code of Civil Procedure section 425.16 and Defendants' demurrer to the complaint. The parties appeared by their respective counsel of record. This constitutes the Court's orders on both motions.

Factual Allegations of the Complaint

Twitter is a private internet communications platform that users can join and use for free by posting content, limited to a certain number of characters, referred to as "Tweets." Plaintiff Meghan Murphy is a self-described "feminist writer and journalist" who resides in Vancouver, British Columbia, Canada. (Compl. ¶¶ 5, 20, 70.) She joined the Twitter platform in April 2011, and used it to "discuss newsworthy events and public issues, share articles, podcasts and videos, promote and support her writing, journalism and public speaking activities, and communicate with her followers," who eventually numbered some 25,000. (*Id.* ¶¶ 43, 71.)

Starting in January 2018, Murphy posted a series of Tweets regarding a person named Hailey Heartless, a self-identified transsexual whose legal name is Lisa Kreut, that referred to that person as a "white man," called her a "trans-identified male/misognynist," and used the male pronoun to refer to her. (*Id.* ¶¶ 91, 92, 94, 96-97 & Ex. Y.) Kreut had identified as a man until approximately three years earlier. (*Id.* ¶¶ 89, 98.) In August 2018, Twitter temporarily suspended Murphy's Twitter account, claiming that four of those Tweets violated its Hateful Conduct Policy and requiring her to delete them before she could regain access to her account. (*Id.* ¶ 96.) In November 2018, Twitter required Murphy to remove two additional Tweets, and then banned her permanently from its social media platform. (*Id.* ¶¶ 5-7, 99-103.) Twitter claimed that Murphy had violated its Hateful Conduct Policy by posting Tweets that expressed views critical of transgender people and of what Murphy describes as the "notion of transgenderism." (*Id.*) Specifically, Twitter required Murphy to remove an October 11, 2018 Tweet that referenced five other Twitter users by username and stated: "Men aren't women tho." (*Id.* ¶ 5.) It also required her to delete an October 15, 2018 Tweet that asked: "How are transwomen not men? What is the difference

between a man and a transwoman?" (*Id.*) Murphy protested those actions in a third Tweet, which Twitter required her to remove as well. (Id. ¶ 6.) It then banned her permanently after she asserted that a transgender woman in Canada formerly named Jonathan Yaniv is "the man responsible for trying to extort money from estheticians who refuse to give him a brazilian bikini wax," asked why the media and courts are "protecting this guy's identity," and then posted a legend attached to a Google review of a waxing salon posted by Yaniv stating, "Yeeeah it's him." (*Id.* ¶¶ 7, 11-13 & Ex. E.) Murphy also reposted screenshots of some of her prior Tweets that Twitter had required her to delete. (Sprankling Decl. Ex. C.)

Twitter's Hateful Conduct Policy states generally, "We do not allow people to promote violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or disease." (*Id.* ¶¶ 3, 8, 51 & Exs. D, E, T.) Murphy alleges that in late October 2018, Twitter amended its Hateful Conduct Policy to prohibit "targeting individuals with repeated slurs, tropes or other content that intends to dehumanize, degrade or reinforce negative or harmful stereotypes about a protected category. This includes targeted misgendering or deadnaming of transgender individuals." (*Id.* ¶¶ 3, 55 & Ex. U.)[1] The policy explained, "Targeting can happen in a number of ways, for example, mentions, including a photo of an individual, referring to someone by their full name, etc." (*Id.* Ex. U at 4/4.) Murphy claims, among other things, that Twitter failed to provide adequate notice to her or other users of that change, and improperly applied it retroactively to her. (*Id.* ¶¶ 4, 56, 61, 105.) She claims the new policy is "viewpoint discriminatory" because it "forbids expression of the viewpoints that 1) whether an individual is a man or a woman is determined by

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[1] "Misgendering" means incorrectly identifying the gender of a person, especially a transgender person, as by using an incorrect pronoun. (https://www.merriam-webster.com/ dictionary/ misgendering; see *Prescott v. Rady Children's Hospital-San Diego* (S.D. Cal. 2017) 265 F.Supp.3d 1090, 1099 [holding that allegations that hospital staff discriminated against transgender boy with gender dysphoria by continuously referring to him with female pronouns, despite knowing that it could cause him severe distress, stated claim under Affordable Care Act].) "Deadnaming" means referring to a transgender person by the name that person was given at birth and no longer uses upon transitioning. (https://www.merriam-webster.com/ dictionary/deadnaming.)

their sex at birth and 2) an individual's gender is not simply a matter of personal preference," viewpoints she alleges are "shared by a majority of the American public." (*Id.* ¶ 58.) She asserts that the new policy "contradicted Twitter's repeated promises and representations . . . that it would not ban users based on their political philosophies, or viewpoints or promulgate policies barring users from expressing certain philosophies or viewpoints." (*Id.*)

Murphy alleges that Twitter amended its Terms of Service on May 17, 2012 to provide, "We may suspend or terminate your accounts or cease providing you with all or part of the Services at any time for any reason, including, but not limited to, if we reasonably believe: (i) you have violated these Terms or the Twitter Rules . . . ." (*Id.* ¶ 63 & Ex. V.) On May 17, 2015, Twitter amended its Terms of Service to state, "We may suspend or terminate your accounts or cease providing with all or part of the Services at any time for any or no reason, including, but not limited to, if we reasonably believe: (i) you have violated these Terms or the Twitter Rules . . . ." (*Id.* & Ex. I.) On January 27, 2016, Twitter revised its Terms of Service to read, "We reserve the right at all times (but will not have an obligation) to remove or refuse to distribute any Content on the Services, to suspend or terminate users, and to reclaim usernames without liability to you." (*Id.* ¶ 64 & Ex. W.) This provision was amended on October 2, 2017 to read, "We may also remove or refuse to distribute any Content on the Services, suspend or terminate users, and reclaims usernames without liability to you." (*Id.* & Ex. X.) Murphy alleges that the portions of Twitter's Terms of Service purporting to give Twitter the right to suspend or ban an account "at any time for any or no reason" and "without liability to you" are procedurally and substantively unconscionable. (*Id.* ¶¶ 65-69.)

Murphy also alleges that while she was a Twitter user, she was subjected to "numerous violent, explicit threats, along with continual abuse and harassment" by other users for her views on transgenderism, but that although she reported these threatening and harassing Tweets on numerous occasions, Twitter took no action in response. (*Id.* ¶ 84.) She also alleges that several

Twitter users who praised a violent attack in London in September 2017 on so-called "trans-exclusionary radical feminists" are still active on Twitter, and none has been banned. (*Id.* ¶ 86.)

In her complaint, Murphy seeks to state three causes of action against Twitter on her own behalf and on behalf of others similarly situated and the general public. In her first cause of action for breach of contract, she alleges that Twitter's User Agreement, which includes its Terms of Service, Rules, and associated policies, constitutes a binding contract with each of its users, including Murphy, and that Twitter breached that contract by failing to provide Murphy with 30 days advance notice of the changes to its Hateful Conduct Policy, by retroactively applying the amended policy to Murphy, and by permanently suspending her account although she did not violate the Terms of Service, Rules or policies. (*Id.* ¶¶ 115-116.) She also seeks to have the Court declare the portions of Twitter's Terms of Service purporting to give Twitter the right to suspend or ban an account "at any time for any or no reason" and "without liability to you" procedurally and substantively unconscionable, to sever those provisions, and enforce the remainder of the contract. (*Id.* ¶¶ 123-125.)

In Murphy's second cause of action, she alleges that Twitter made several "clear and unambiguous" promises in its Terms of Service, Rules, and Enforcement Guidelines, including a statement in the Rules at the time Murphy joined that "we do not actively monitor user's content and will not censor user content" except in limited circumstances not present here, and statements that Twitter would provide 30 days advance notice of changes in the Terms of Service and not apply any changes retroactively. (*Id.* ¶ 128.) She also alleges that in sworn testimony to Congress in September 2018, Twitter's CEO stated that Twitter does not "consider political viewpoints, perspectives, or party affiliation in any of our policies or enforcement decisions, period." (*Id.* ¶¶ 62, 128(f) & Ex. B.) Murphy contends that she and other similarly-situated users reasonably relied on these alleged promises to their detriment in joining Twitter and remaining on that platform, that such reliance was foreseeable and calculated and Twitter intended that customers would rely on these promises in joining and remaining on that platform, and that she and others have been injured

by such reliance by having lost "valuable economic interests in access to their Twitter account and their followers forever." (*Id.* ¶¶ 129-131.)

In her third cause of action, Murphy alleges violations of the Unfair Competition Law, Bus. & Prof. Code § 17200 *et seq.* (*Id.* ¶¶ 132-144.) She alleges that Twitter committed an unfair business practice by inserting the alleged unconscionable provisions allowing it to suspend or ban accounts "at any time for any reason" into its Terms of Service. (*Id.* ¶ 135.) She also alleges that Twitter's practices are "fraudulent" within the meaning of the UCL because Twitter falsely held itself out to be a free speech platform and promised not to actively monitor or censor user content. (*Id.* ¶¶ 137-140.)

In the prayer for relief of her complaint, Murphy seeks a broad range of injunctive relief, including orders prohibiting Twitter from enforcing its "misgendering" rule, directing it to restore access to any accounts it has suspended or banned for violation of that rule, prohibiting it from promulgating or enforcing any other rules or policies that discriminate based on viewpoint, ordering it not to make material changes to its User Agreement without providing 30 days' advance of the changes, prohibiting it from attempting to enforce any changes in its User Agreement retroactively, requiring it to remove the purportedly unconscionable provisions in its Terms of Service governing suspending or banning accounts, and requiring Twitter to "issue a full and frank public correction of its false and misleading advertising and representations to the general public that it does not censor user content except in narrowly-defined, viewpoint-neutral circumstances . . . ." (Compl. at 40-41.) She also seeks declaratory relief that Twitter has violated its contractual agreements with Murphy and similarly-situated users, and has violated the UCL. (*Id.* at 41-42.)

Twitter has filed a special motion to strike the complaint under California's anti-SLAPP law, Code Civ. Proc. § 425.16. It has also filed a demurrer to the complaint. The Court addresses those motions in order.

I. Anti-SLAPP Special Motion to Strike

Code of Civil Procedure section 425.16(b)(1) provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of free petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." The analysis of an anti-SLAPP motion proceeds in a familiar two-step approach. (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321.) Before engaging in this analysis, however, a court must consider any claims by the plaintiff that a statutory exemption contained in section 425.17 applies. (*San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 622.)

Murphy contends that the anti-SLAPP law does not apply here, based on two statutory exceptions, the public interest and commercial speech exemptions. (Code Civ. Proc. §§ 425.17(b), (c).) Because the Court agrees that the first of these is dispositive, it need not address the second.[2]

Section 425.17(b) provides that the anti-SLAPP law "does not apply to any action brought solely in the public interest or on behalf of the general public," if all of the following conditions exist: "(1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member"; "(2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons"; "(3) Private enforcement is necessary and places a disproportionate burden on the plaintiff in relation to the plaintiff's stake in the matter." A plaintiff has the burden to establish the applicability of this exemption. (*San Diegans for Open Government*, 240 Cal.App.4th at 622, citing *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 25-26.)

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[2] A recent decision by the California Supreme Court addresses the latter exemption. (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133.)

The court looks to the allegations of the complaint and the scope of relief sought in order to determine whether the public interest exception applies. (*Cruz v. City of Culver City* (2016) 2 Cal.App.5th 239, 249, citing *Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1460; see also *People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 499 ["we rely on the allegations of the complaint because the public interest exception is a threshold issue based on the nature of the allegations and scope of relief sought in the prayer"].) The question is whether the plaintiff has "an individual stake in the outcome that defeats application of the public interest exception." (*Cruz*, 2 Cal.App.5th at 249-250 [holding that public interest exception did not apply to claim that city violated Brown Act by discussing and taking action on a change to parking restrictions in plaintiffs' neighborhood even though it was not on the agenda, where plaintiffs sought personal relief to keep parking restrictions in place].)

The exception applies "only when the entire action is brought in the public interest. If any part of the complaint seeks relief to directly benefit the plaintiff, by securing relief greater than or different from that sought on behalf of the general public, the section 425.17 exception does not apply." (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 312 (*Sierra Club*); see also *id.* at 317 ["Use of the term 'solely' expressly conveys the Legislative intent that section 425.17(b) not apply to an action that seeks a more narrow advantage for a particular plaintiff. Such an action would not be brought 'solely' in the public's interest. The statutory language of 425.17(b) is unambiguous and bars a litigant seeking 'any' personal relief from relying on the section 425.17(b) exception."].)[3]

Here, the Complaint does not seek damages for Murphy individually, but instead seeks solely injunctive and declaratory relief that, if granted, would benefit the class of persons of which Murphy is a member—e.g., Twitter users whose accounts have been suspended or banned for

[3] Twitter argued at the hearing that the requirement that the complaint have been brought "solely in the public interest" establishes an independent factor that must be satisfied in addition to the enumerated statutory elements. The Court disagrees. In context, it is clear that those elements *define* when an action is brought "solely in the public interest or on behalf of the general public." Nothing in *Sierra Club* is to the contrary.

violation of the "misgendering" rule of the Hateful Conduct Policy, as well as users whose accounts have been suspended or banned by retroactive application of changes to Twitter's Terms of Service or Rules, or under the guise of the provision allowing Twitter to suspend accounts "at any time for any or no reason." (See Compl. ¶ 113 [alleging that Murphy "seeks no monetary relief other than her attorney's fees. Instead, she seeks injunctive relief that is identical to that sought on behalf of other similarly-situated persons and the general public."].) To be sure, such relief, if granted, undoubtedly would benefit Murphy personally, by restoration of her Twitter account, which she specifically alleges had "significant monetary value" to her. (Compl. ¶ 109.) However, she does not seek any relief greater than or different from the relief sought for the class of persons she purports to represent.[4] (Cf. *Sierra Club*, 45 Cal.4th at 317 [portions of prayer for relief sought personal advantage by advancing plaintiffs' own interests in Club elections].) Further, Murphy purports to bring this action on behalf of similarly situated Twitter users, and asserts claims under the UCL, which further supports the conclusion that the public interest exemption applies. (See *Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1460-1461 [holding that borrower's putative class and representative action against debt collectors under the Fair Debt Collections Practices Act and the UCL was brought solely in the public interest where plaintiff did not seek damages or restitution on behalf of himself or the class or the general public, but sought only injunctive relief]; *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1066 ["On its face, [section 425.17] subdivision (b) appears to exempt class actions and private attorney general suits from treatment under section 425.16. A review of the legislative history confirms that was the intent of the Legislature."]; see also *People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 500-505 [public interest exception applied to qui tam action].)

[4] Twitter argues that Murphy has not alleged that any other specific individual is, in fact, similarly situated. She has, however, alleged that Twitter's rules and policies affect many other persons, and it appears to be undisputed that Twitter has suspended or banned other accounts for violations of those policies. Murphy's allegations are sufficient for the Court to conclude that the public interest exception applies.

On the face of the complaint, the Court concludes the public interest exemption applies, and Twitter's anti-SLAPP motion therefore must be denied. While Twitter is correct that because section 425.17(b) is a statutory exception to section 425.16, it should be narrowly construed (*Sierra Club*, 45 Cal.4th at 316), here it applies by its terms. "It bears emphasizing that our conclusion here is that the plaintiffs' claims are the *kind* of claims the Legislature intended to exempt from the scope of the anti-SLAPP statute when it adopted section 425.17. This conclusion is entirely independent of any evaluation of the merits of those claims, or even the adequacy of plaintiffs' pleadings." (*The Inland Oversight Committee v. County of San Bernadino* (2015) 239 Cal.App.4th 671, 678.) It is to the latter issue that the Court next turns.

II. **Demurrer to Complaint**

Twitter demurs to all three causes of action in the complaint. The dispositive issue common to all three is whether, as Twitter contends, the complaint is barred by Section 230 of the federal Communications Decency Act, 47 U.S.C. § 230 (Section 230).[5] The Court finds that it is, and therefore sustains the demurrer in its entirety without leave to amend.

Section 230(c) bears the heading, "Protection for 'good samaritan' blocking and screening of offensive material." Section 230(c), subparagraph (1), "Treatment of publisher or speaker," provides in pertinent part that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of information provided by another information content provider." (47 U.S.C. § 230(c)(1).) An "interactive computer service" is "any information service, system . . . that provides or enables computer access by multiplier users to a computer server." (*Id.* § 230(f)(2).) An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." (*Id.* § 230(f)(3).) Finally, the CDA provides, "No cause

[5] Twitter also contends that the claims in the complaint are barred by the First Amendment. In view of the Court's holding that they are barred by Section 230, it need not reach this additional issue. (See *Hassell v. Bird* (2018) 5 Cal.5th 522, 534 ["Because the statutory argument [under Section 230] is dispositive, there is no need to address the due process question."].)

of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (*Id.* § 230(e)(3).)[6]

Here, there is no dispute that Twitter is a "provider . . . of an interactive computer service" within the meaning of Section 230(c)(1). Indeed, federal courts have so found. (See *Pennie v. Twitter, Inc.* (N.D. Cal. 2017) 281 F.Supp.3d 874, 888; *Fields v. Twitter, Inc.* (N.D. Cal. 2016) 217 F.Supp.3d 1116, 1121, *aff'd*, 881 F.3d 739 (9th Cir. 2018); see also *Hassell v. Bird* (2018) 5 Cal.5th 522, 540 [holding that Yelp is a provider or user of an interactive computer service], citing *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1101.) Nor is there any dispute that Murphy's Tweets are "information provided by another information content provider." (47 U.S.C. § 230(c)(1), (f)(3); see *Hassell*, 5 Cal.5th at 540.) The parties' dispute centers on whether Murphy seeks to impose liability on Twitter *in its capacity as publisher*. Because all three causes of action of the complaint seek to impose liability on Twitter for its actions in suspending or banning Murphy's and others' Twitter accounts, and in enforcing policies governing the permissible scope of content in those accounts—all actions within the traditional scope of a publisher's role—Section 230 controls.

Congress enacted Section 230 in 1996 "'for two basic policy reasons: to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.'" (*Hassell*, 5 Cal.5th at 534.)[7] Indeed, one impetus for Section 230

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[6] Plaintiffs contend that subparagraph (c)(1) should be given a narrow reading, limiting its scope to immunity from claims arising out of speech by third parties, and that the only provision of Section 230 that has any potential application here is subparagraph (c)(2). That subparagraph provides that "[n]o provider or user of an interactive computer shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . . " (47 U.S.C. § 230(c)(2)(A).) However, controlling authority has squarely rejected Plaintiffs' argument "that a broad reading of section 230(c)(1) would make section 230(c)(2) unnecessary." (*Barrett*, 40 Cal.4th at 49.)

[7] Unless otherwise indicated, all citations to *Hassell* in this order are to the Court's plurality opinion. Justice Kruger, concurring in the judgment, did not disagree with the plurality's overall analysis of Section 230. (See 5 Cal.5th at 548, 557-558 ["section 230 immunity applies to an effort to bring a cause of action or impose civil liability on a computer service provider that derives from

was "a judicial decision opining that because an operator of Internet bulletin boards had taken an active role in policing the content of these fora, for purposes of defamation law it could be regarded as the 'publisher' of material posted on these boards by users." (*Id.*, discussing *Stratton Oakmont, Inc. v. Prodigy Services Co.* (N.Y.Sup.Ct. 1995) 23 Media L.Rep. 1794 [1995 WL 323710]; see also *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 51 ["section 230 was enacted to remove the disincentives to self-regulation created by the *Stratton Oakmont* case, in which a service provider was held liable as a primary publisher because it actively screened and edited messages posted on its bulletin boards."].) "'Fearing that the specter of liability would . . . deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity,' which 'forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.'" (*Barrett*, 40 Cal.4th at 43, quoting *Zeran v. America Online, Inc.* (4th Cir.1997) 129 F.3d 327, 331.)

As its plain language and legislative history make clear, "'[Section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, *withdraw*, postpone or alter content—are barred.'" (*Barrett*, 40 Cal.4th at 43 (emphasis added); see also *id.* at 45 ["'[O]nce a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service must decide whether to publish, edit, or withdraw the posting. In this respect, [plaintiff] seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability—the publisher role.'"]; see also *Hassell*, 5 Cal.4th at 544 [Section 230 was intended to shield service providers "from compelled compliance with

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its status as a publisher or speaker of third party content."] [conc. opn. of Kruger, J.].) Neither did Justice Cuéllar's dissent. (See *id.* at 567-568 ["S]ection 230 . . . confer[s] immunity . . . against a cause of action filed directly against the platform, seeking to hold it liable for conduct as the publisher of third party content."] [dis. opn. of Cuéllar, J.].) Thus, notwithstanding their differences regarding the other issues posed in that case, a majority of the Court endorsed the core principle on which this order turns.

demands for relief that, when viewed in the context of a plaintiff's allegations, . . . similarly assign them the legal role and responsibilities of a publisher qua publisher."].)

That this case involves Twitter's decision to take down content rather than to post it is immaterial: "No logical distinction can be drawn between a defendant who actively selects information for publication and one who screens submitted material, removing offensive content. 'The scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance.'" (*Barrett*, 40 Cal.4th at 62, quoting with approval *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1032.) An "editor's job [is], essentially, to determine whether or not to prevent [material tendered for] posting—precisely the kind of activity for which section 230 was meant to provide immunity. And any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." (*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* (9th Cir. 2008) (en banc) 521 F.3d 1157, 1170-1171 (footnote omitted).)

In light of this overarching principle, California and federal courts are in accord that actions that, like the instant case, seek relief based on an internet service provider's decisions whether to publish, edit, or withdraw particular postings are barred by Section 230. (See, e.g., *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 206-207 [CDA barred claim against Facebook based on failure to remove page that allegedly incited violence and generated death threats against plaintiffs, rap artist and affiliated entities]; *Doe II v. MySpace, Inc.* (2009) 175 Cal.App.4th 561, 573 [CDA barred claims against MySpace for failure to ensure that sexual predators do not communicate with minors on its website, a "type of activity—"to restrict or make available certain material—[that] is expressly covered by section 230"]; *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.* (N.D. Cal. 2015) 144 F.Supp.3d 1088, 1094-1095 [CDA barred claim under title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000a) by blocking access to plaintiff's Facebook page in India, which sought "to hold Defendant liable for Defendant's decision 'whether to publish' third-party content."].)

In particular, federal courts have specifically ruled that a service provider's decisions to provide, deny, suspend or delete user accounts are immunized by Section 230. (See, e.g., *Fields v. Twitter, Inc.*, 217 F.Supp.3d 1116, 1124 ["the decision to furnish an account, or prohibit a particular user from obtaining an account, is itself publishing activity."]; see also *Riggs v. MySpace, Inc.* (9th Cir. 2011) 444 Fed.Appx. 986, 987 [claims "arising from MySpace's decisions to delete . . . user profiles on its social networking website yet not delete other profiles . . . were precluded by section 230(c)(1) of the Communications Decency Act."]; *Cohen v. Facebook, Inc.* (E.D.N.Y. 2017) 252 F.Supp.3d 140, 157 ["Facebook's choices as to who may use its platform are inherently bound up in its decisions as to what may be said on its platform, and so liability imposed based on its failure to remove users would equally 'derive[] from [Facebook's] status or conduct as a 'publisher or speaker.'"]; *Mezey v. Twitter, Inc.* (S.D. Fla. 2018) 2018 WL 5306769 at *1 [CDA barred plaintiff's claims challenging Twitter's decision to suspend his Twitter account].)

Finally, that Murphy alleges causes of action for breach of contract, promissory estoppel, and unfair competition rather than defamation or other tort claims does not place her claims outside the scope of immunity provided by the CDA, because all of those claims seek to treat Twitter as a publisher or speaker of information. In *Hassell*, the Supreme Court explicitly rejected the plaintiffs' efforts "to avoid section 230 through the 'creative pleading' of barred claims . . . ." (*Hassell*, 5 Cal.5th at 535.) In particular, the Court held that Section 230 immunity extends to claims for injunctive and declaratory relief. (*Id.* at 537-538, discussing *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684; see also *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 806 ["While many of the cases addressing CDA immunity have involved claims for defamation [citations], it is clear that immunity under section 230 is not so limited."].)

Here, like the plaintiffs in *Cross*, Murphy contends her claims are not barred by Section 230 because she is seeking to hold Twitter liable for contractual statements or promises made in its Terms of Service and Rules. (See *Cross*, 14 Cal.App.5th at 200-201, 206-207.) But "[i]n evaluating whether a claim treats a provider as a publisher or speaker of user-generated content,

'what matters is not the name of the cause of action''; instead, 'what matters is whether the cause of action inherently requires the court to treat the defendant as the "publisher or speaker" of content provided by another.'" (*Id.* at 207, quoting *Barnes*, 570 F.3d at 1101-1102.) Here, the duties Murphy alleges Twitter violated derive from its status or conduct as a publisher because its decision to suspend her accounts, and those of other similarly situated users who violated its Hateful Conduct Policy, constitutes publishing activity. (*Cohen v. Facebook, Inc.*, 252 F.Supp.3d at 157; *Fields v. Twitter, Inc.*, 217 F.Supp.3d at 1123-1124.) As *Hassell* made clear, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." (*Hassell*, 5 Cal.5th at 536.)

For this reason, Murphy's reliance on *Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294 is misplaced. In *Demetriades*, plaintiff was a restaurant operator who filed a complaint seeking an injunction under the unfair competition law and the false advertising law to prevent Yelp from making a series of representations about the accuracy and efficacy of its "filter" for unreliable or biased customer reviews, including that it produced "'the most trusted reviews.'" (*Id.* at 300-301.) The trial court granted Yelp's anti-SLAPP motion. The Court of Appeal reversed, holding that Yelp's representations about its review filter constituted commercial speech within the exemption of Code of Civil Procedure section 425.17(c), and consisted of representations of fact that were made for the purpose of promoting or securing advertisements on its website. In a brief two-paragraph discussion at the end of its opinion, the court acknowledged that "courts uniformly hold that claims based on a Web site's editorial decisions (publication, or failure to publish, certain third-party conduct) are barred by section 230." (*Id.* at 313.) However, it held that Section 230 did not apply, because "[n]owhere does plaintiff seek to enjoin or hold Yelp liable for the statements of third parties (i.e., reviewers) on its Web site. Rather, plaintiff seeks to hold Yelp liable for its own statements regarding the accuracy of its filter." (*Id.*)

In sharp contrast to *Demetriades*, fairly read, Murphy's complaint is not seeking to hold Twitter liable for its purely commercial statements to users or potential advertisers.[8] Rather, all of her claims challenge Twitter's interpretation and application of its Terms of Service and Hateful Conduct Policy to require Murphy to remove certain content she had posted in her Twitter account, to suspend that account, and ultimately to ban her from posting from Twitter due to her repeated violations of the Terms of Service and Policy. All of those actions reflect paradigmatic editorial decisions not to publish particular content, and therefore are barred by Section 230.

CONCLUSION

For the foregoing reasons, Twitter's special motion to strike the complaint under Code of Civil Procedure section 425.16 is denied, and its demurrer to the complaint is sustained without leave to amend.

IT IS SO ORDERED.

Dated: June 12, 2019

HON. ETHAN P. SCHULMAN

[8] *Barnes* is similarly distinguishable. There, plaintiff alleged that Yahoo "undertook to remove from its website material harmful to the plaintiff but failed to do so." (570 F.3d at 1098.) The Ninth Circuit held that plaintiff's theory of recovery under promissory estoppel was not barred by Section 230 because it dod not treat Yahoo as a "publisher or speaker" under the CDA. (*Id.* at 1107-1109.) Here, as discussed in text, Murphy is not seeking damages for Twitter's failure to comply with an alleged contractual or quasi-contractual promise, but rather is seeking injunctive relief to compel it to restore her and others' Twitter accounts and to refrain from enforcing its Hateful Content Policy against her. In any event, to the degree that *Barnes* is arguably inconsistent with *Cross*, this Court is, of course, bound by the latter decision. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction."].)

CGC-19-573712 MEGHAN MURPHY VS. TWITTER C. ET AL

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on June 12, 2019 I served the foregoing ORDER DENYING SPECIAL MOTION TO STRIKE THE COMPLAINT UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16 AND SUSTAINING DEMURRER TO COMPLAINT WITHOUT LEAVE TO AMEND on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: June 12, 2019

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